

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KENNETH W. TUNCH,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting Commissioner
of Social Security,

Defendant.

Case No. 3:16-CV-05173-TSZ-BAT

**REPORT AND
RECOMMENDATION**

Kenneth W. Tunch seeks review of the redetermination and cessation of his entitlement to his Disability Insurance Benefits. He contends the ALJ erred in finding he was no longer disabled and entitled to benefits after December 13, 2012, because the finding was based on an erroneous adverse credibility determination and because the ALJ's conclusion that he medically improved and no longer had severe, medically determinable mental impairments was contrary to his medical record. Dkt. 12. As discussed below, the Court recommends the case be **REVERSED** and **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

In September 2002, Mr. Tunch was found entitled to a period of disability beginning

1 October 31, 1997 and to Disability Insurance Benefits under Title II of the Social Security Act.
2 Tr. 66. Specifically, the ALJ concluded Mr. Tunch had not engaged in any substantial gainful
3 activity since October 31, 1997; he had severe impairments of bipolar disorder, status post-
4 cervical fusion, and left hand tendon injury; and his impairments met the criteria for Listing
5 12.04. Tr. 62-66. In November 2012, the Social Security Agency's ("SSA") Cooperative
6 Disability Investigation Unit (CDIU) completed an investigation of Mr. Tunch after the
7 Disability Determination Services office "found inconsistencies in [his] allegations and
8 presentations throughout the file." Tr. 615. The SSA subsequently ceased Mr. Tunch's benefits
9 as of December 13, 2012. Tr. 73-74, 85-87. Mr. Tunch requested reconsideration but the
10 determination was upheld in July 2013. Tr. 22. ALJ Gary Elliott conducted a hearing on
11 September 11, 2014. *See id.* In a decision dated November 5, 2014, the ALJ concluded Mr.
12 Tunch's entitlement to disability benefits ended on December 13, 2012. Tr. 22-30.

13 In concluding Mr. Tunch was no longer entitled to benefits, the ALJ applied an eight-step
14 sequential evaluation process. *See* 20 C.F.R. § 404.1594(f). At step one, the ALJ evaluated
15 whether Mr. Tunch was engaged in substantial gainful activity, and determined he was not. Tr.
16 23 (citing 20 C.F.R. § 404.1594(f)(1)). At step two, the ALJ assessed whether Mr. Tunch had an
17 impairment or combination of impairments that met or equaled the severity of a listed
18 impairment. Tr. 22; *see also* 20 C.F.R. § 404.1594(f)(2). The ALJ found Mr. Tunch has severe,
19 medically determinable impairments of status-post cervical fusion, hypertension, and status-post
20 left hand injury, but that these impairments do not meet or medically equal the severity of a listed
21 impairment. Tr. 24-25. The ALJ did not find Mr. Tunch has any severe mental impairment. *See*
22 *id.* At step three, the ALJ evaluated whether medical improvement had occurred, resulting in a
23 decrease in the severity of Mr. Tunch's impairments, and determined Mr. Tunch medically

improved as of December 13, 2012. Tr. 25; *see also* 20 C.F.R. § 404.1594(f)(3). The ALJ determined at step four that Mr. Tunch's medical improvement is related to the ability to work. Tr. 26; *see also* 20 C.F.R. § 404.1594(f)(4). This finding prompted the ALJ to continue to step six¹ to determine whether Mr. Tunch's impairments, in combination, are severe. 20 C.F.R. § 404.1594(f)(6). Here, the ALJ found Mr. Tunch's medically determinable *physical* impairments are severe. Tr. 26. At step seven, the ALJ found Mr. Tunch has the RFC to perform the full range of medium work. Tr. 27; *see also* 20 C.F.R. § 404.1594(f)(7). At step eight, the ALJ found Mr. Tunch had no past relevant work, but that jobs exist in significant numbers in the national economy that he can perform. Tr. 29; *see also* 20 C.F.R. § 404.1594(f)(8). As the Appeals Council denied Mr. Tunch's request for review, the ALJ's November 5, 2014 decision is the Commissioner's final decision. Tr. 1-7.

DISCUSSION

A. The ALJ Did Not Err in Issuing an Adverse Credibility Determination

At steps two and three of the sequential evaluation process, the ALJ found that, based on a preponderance of the evidence, "fraud or similar fault," as that term is used in 42 U.S.C. § 405(u), 20 C.F.R. § 416.929, and SSR 00-2p, was involved in Mr. Tunch's statements at his hearing and to providers.² Tr. 24-26. Pursuant to 42 U.S.C. § 405(u)(1)(B), "the Commissioner

¹ 20 C.F.R. § 404.1594(f)(4) directs the Commissioner to continue to step 6 if medical improvement is related to the claimant's ability to work.

² 42 U.S.C. § 405(u) governs the redetermination of entitlement to benefits and provides in relevant part: The Commissioner of Social Security shall immediately redetermine the entitlement of individuals to monthly insurance benefits under this subchapter if there is reason to believe that fraud or similar fault was involved in the application of the individual for such benefits. 42 U.S.C. § 405(u)(1)(A). "Similar fault" may be found where "(A) an incorrect or incomplete statement that is material to the determination is knowingly made; or (B) information that is material to the determination is knowingly concealed." *Id.* at § 405(u)(2)(A), (B). The ALJ found that Mr. Tunch's statements "involved material matters before the undersigned and that the claimant knew the evidence provided was false or incomplete at the time the claimant

1 of Social Security shall disregard any evidence if there is reason to believe that fraud or similar
 2 fault was involved in the providing of such evidence.” The ALJ thus disregarded “all [Mr.
 3 Tunch’s] subjective statements in [his disability application], [his] statements made for the
 4 benefit of evaluation or treatment, and [his] testimony at hearing.” *Id.* at 25.

5 Mr. Tunch argues the ALJ must provide clear and convincing reasons for discounting his
 6 credibility because “none of the evidence cited by the ALJ provides [Mr. Tunch] was
 7 malingering.” Dkt. 12 at 14; *see also Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)
 8 (“Where . . . there is no evidence of malingering, an ALJ must provide clear and convincing
 9 reasons to reject a claimant’s testimony.”). Mr. Tunch further contends the ALJ failed to provide
 10 clear and convincing reasons to reject his credibility because, as the Court understands the
 11 argument, the ALJ’s credibility determination is unsupported by fact. *See* Dkt. 12 at 12-16. Mr.
 12 Tunch does not specifically challenge the ALJ’s fraud or similar fault assessment; nevertheless,
 13 that assessment and the ALJ’s adverse credibility determination are inextricably linked.³ The
 14 Court therefore approaches this issue as it would an adverse credibility determination, and finds
 15 that, even in the absence of a specific finding of malingering, the ALJ provided clear and
 16 convincing reasons for disregarding Mr. Tunch’s credibility.

17 The ALJ first cited the November 29, 2012 CDIU report which showed that Mr. Tunch
 18 “was capable and currently performing significant activities inconsistent with the degree of
 19 limitation claimed,” and that he was “active in performing church duties, managing church
 20 finances, interacting with others, cooking, driving, and shopping.” Tr. 26 (citing 614-32). Mr.

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 22 provided the evidence.” Tr. 25.

23 ³ In assessing Mr. Tunch’s RFC, the ALJ stated: “For the reasons discussed throughout this
 decision, the claimant’s subjective complaints of limitation are excluded, because fraud or
 similar fault was involved in the claimant’s statements. . . . the claimant’s statements concerning
 the intensity, persistence and limiting effects of [his] symptoms are not credible.” Tr. 27.

1 Tunch contends this evidence is not convincing because he testified he was never a pastor of a
2 church, all members of his church consider themselves ministers, the church only had about eight
3 members, and he attends Bible study once per week but does not act as group leader. Dkt. 12 at
4 14. The arguments are not persuasive, particularly because Mr. Tunch cites only his own
5 testimony and no other portion of the medical record. In weighing a claimant's credibility, an
6 ALJ may consider inconsistencies either in the claimant's testimony or between his testimony
7 and his conduct, and his daily activities. *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir.
8 1997). The report also indicated Mr. Tunch could "move without difficulty, walk briskly
9 without impairment, carry his young son, load his car with groceries, and move furniture,"
10 contrary to Mr. Tunch's allegations he could lift no more than 10 pounds. Tr. 26 (citing Tr.
11 617). Mr. Tunch does not address the ALJ's findings regarding inconsistencies in his physical
12 limitations. The ALJ's reasons were thus clear and convincing.

13 The ALJ also noted that, though Mr. Tunch alleged on the one hand that he had an 11th
14 grade education, he also represented to the Veterans Administration that he earned a GED in
15 2011 and degrees in Ministry, Applied Technology, and Business Administration. Tr. 26 (citing
16 Tr. 306). Mr. Tunch correctly observes that the report the ALJ cited regarding his 11th grade
17 education makes no such reference. Dkt. 12 at 14. The Court thus agrees this reasoning was
18 neither clear nor convincing.

19 The ALJ also found that official records filed with the Secretary of State indicating Mr.
20 Tunch was the president, 55% owner, director, and registered agent for a church he founded in
21 2006, were inconsistent with claims he was only minimally involved with volunteer church
22 activities. Tr. 26 (citing 199-203). Mr. Tunch contends his name was entered on paperwork
23 without his knowledge or consent. Dkt. 12 at 14 (citing Tr. 50). The Court concludes it was not

1 unreasonable for the ALJ to rely on official state filings to question Mr. Tunch's credibility or to
2 find he was engaged in activities suggesting he no longer had impairments consistent with his
3 alleged mental health impairments.

4 Finally, the ALJ found Mr. Tunch knowingly made statements to providers that were
5 untrue and designed to mislead. Tr. 26. In support of this conclusion, the ALJ cited a medical
6 record wherein Mr. Tunch expressed disapproval of the provider's use of the word "serious"
7 instead of "severe" in describing his limitations for the purpose of his SSI reevaluation. Tr. 797.
8 The provider agreed to "write a second letter that will hopefully more fully reflect this veteran's
9 request." *Id.* The ALJ also found that Mr. Tunch erroneously informed his provider that "both
10 Veterans Administration and the Social Security Administration categorized him as 'disabled,'"
11 which the ALJ found was a knowingly false statement because Mr. Tunch was up for review of
12 his social security benefits. Tr. 26. Additionally, the ALJ observed the provider "previously
13 refused to provide [Mr. Tunch] with a letter opinion that the claimant was unable to work
14 secondary to mental health impairments." Tr. 26. This particular finding is not supported by the
15 record: in reality, the provider stated he could not speak to the question of disability because that
16 determination was "not within the scope of my practice within VA." Tr. 816. Nevertheless, the
17 Court is satisfied that Mr. Tunch's report to his provider that he was viewed as having a
18 disability by the SSA was misleading, and it was therefore not unreasonable for the ALJ to
19 question his reputation for truthfulness. *See Light*, 119 F.3d at 792.

20 Mr. Tunch also argues he never received a gift or payment from the church, and his
21 earning records reflect that an erroneous credit for earned income of \$50,000 was removed. Dkt.
22 12 at 14 (citing Tr. 184). The argument is also unpersuasive. Though it is true the CDIU report
23 stated Mr. Tunch received a \$50,000 payment for "services in kind" in 2009, Tr. 615, the ALJ

1 did not cite this payment or even paid work as a basis for discounting his credibility and
2 concluding he had medically improved. *See* Tr. 25-26.

3 In summary, Mr. Tunch has failed to establish the ALJ provided no valid reasons to
4 discount his credibility. The Court thus recommends affirming the ALJ. *See Carmickle v.*
5 *Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008) (including an erroneous reason
6 among other reasons to discount a claimant’s credibility is at most harmless error if the other
7 reasons are supported by substantial evidence and the erroneous reason does not negate the
8 validity of the overall credibility determination).

9 **B. The ALJ’s Step Three Finding Did Not Consider Mr. Randolph’s Evaluations**

10 Mr. Tunch also contends the ALJ erred in finding he medically improved and no longer
11 has severe, mentally determinable impairments as of December 13, 2013. Dkt. 12 at 2-12. He
12 argues the conclusion is contrary to his medical record. *Id.* In support of his argument, Mr.
13 Tunch discusses a number of medical opinions pre-dating his disability termination date. The
14 ALJ gave “little weight” to the opinions dated before December 13, 2012 because they did not
15 discuss the “period at issue,” which the ALJ characterized as the period between that date (the
16 date Mr. Tunch’s entitlement to benefits came under scrutiny), and the date of the ALJ’s
17 decision. Tr. 27. Mr. Tunch does not address the ALJ’s rejection of these opinions as irrelevant
18 to the period at issue. Rather, he contends the ALJ erred because the step-two inquiry is a de
19 minimus screening device to dispose of groundless claims, and an impairment can only be found
20 “not severe” if the evidence establishes a slight abnormality that has no more than a minimal
21 effect on the individual’s ability to work. Dkt. 12 at 8; *see also Smolen v. Chater*, 80 F.3d 1273,
22 1290 (9th Cir. 1996). Mr. Tunch’s arguments reveal he misunderstands the context of the ALJ’s
23 decision. Disability reviews for determining a continued, rather than initial, entitlement to

1 benefits are governed by the eight-step evaluation process described in 20 C.F.R. § 404.1594(f),
2 and not the five-step evaluation process enumerated in 20 C.F.R. § 404.1520. *Cf.* §
3 404.1520(a)(5) (“If you are already receiving disability benefits, we will use a different
4 sequential evaluation process to decide whether you continue to be disabled. We explain this
5 process in § 404.1594(f).”). At step three of this eight-step process, the ALJ must determine if
6 medical improvement has occurred which results in a decrease in the medical severity of the
7 claimant’s impairments. *See* 20 C.F.R. § 404.1594(f)(3). At this step, the ALJ found Mr. Tunch
8 no longer had any medically determinable mental health impairments. Tr. 25. Mr. Tunch does
9 not explain how his analysis — centered upon step two of the five-step *initial* disability
10 evaluation process — applies in a disability *review* case. In the absence of a clearly applicable
11 argument, the Court declines to find the ALJ erred in disregarding opinion evidence rendered
12 before the date his benefits were terminated.⁴

13 The ALJ also stated he gave no weight to opinions during the period at issue that relied
14 exclusively on Mr. Tunch’s subjective complaints, and instead, considered only evidence based
15 on “objective, verifiable findings.” *Id.* (citing Exs. 13F, 14F, 19F, 20F, 21F, 24F, 25F, 26F).
16 Mr. Tunch also discussed medical evidence post-dating December 13, 2012, but failed to address
17 the ALJ’s assignment of no weight to the opinions that relied exclusively on his subjective
18 complaints. The Court thus finds Mr. Tunch’s argument largely unpersuasive,⁵ with the
19 exception of several records dated after December 13, 2012 that did not rely exclusively on Mr.

20 ⁴ Arguments that are unsupported by explanation may be deemed to be waived. *See Avila v.*
21 *Astrue*, No. C07-1331, 2008 WL 4104300 (E.D. Cal. Sept. 2, 2008) at *2 (unpublished opinion)
(*citing Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 923-24 (9th Cir. 1996)
22 (party who presents no explanation in support of claim of error waives issue)).

23 ⁵ Mr. Tunch cites other records post-dating December 13, 2013, including group therapy
progress notes and treatment notes with Dr. Clemens and Dr. Lim. Dkt. 12 at 6-8. But nothing
in these notes suggest medical opinions were rendered based on objective findings, rather than
self-reports and subjective complaints.

1 Tunch's subjective complaints and that were not explicitly discussed by the ALJ. Treating
2 provider Dwight Randolph, LMHC, completed a Psychiatric/Psychological Impairment
3 Questionnaire in May 2014, and diagnosed depressive disorder, PTSD, and bipolar disorder. Tr.
4 1014-22. The provider indicated the diagnoses were based on OASIS, a modified structured
5 clinical interview for DSM-IV PTSD, the Beck Depression Inventory, and the Burns Anxiety
6 Scale. Tr. 1016; *see also* Tr. 697-700 (February 12, 2013 evaluation); 744-747 (February 1,
7 2013 evaluation). Because Dr. Randolph's opinions were not formed purely on Mr. Tunch's
8 subjective complaints, the ALJ should have explained why the evidence was rejected. *Vincent v.*
9 *Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984). The ALJ failed to do so. Thus, on remand, Mr.
10 Randolph's opinions dated after December 13, 2012, should be evaluated and discussed in the
11 ALJ's decision.

12 CONCLUSION

13 For the foregoing reasons, the Court recommends that the Commissioner's decision be
14 **REVERSED** and the case be **REMANDED** for further administrative proceedings under
15 sentence four of 42 U.S.C. § 405(g).

16 On remand, the ALJ should evaluate and discuss Dr. Randolph's opinions post-dating
17 December 13, 2012.

18 A proposed order accompanies this Report and Recommendation. Any objection to this
19 Report and Recommendation must be filed and served no later than **September 2, 2016**. If no
20 objections are filed, the Clerk shall note the matter for September 6, 2016 as ready for the
21 Court's consideration. If objections are filed, any response is due within 14 days after being
22 served with the objections. A party filing an objection must note the matter for the Court's
23 consideration 14 days from the date the objection is filed and served. Objections and responses

1 shall not exceed ten pages. The failure to timely object may affect the right to appeal.

2 DATED this 19th day of August, 2016.

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6 BRIAN A. TSUCHIDA
7 United States Magistrate Judge
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